APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 73-1668 and 73-1669

[Filed Sep. 26, 1974, John P. Hehman, Clerk]

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiffs-Appellants,

v.

CLAUDE S. BRINEGAR, Secretary,
U. S. Department of Transportation,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, Commissioner Tennessee
Department of Highways,
Defendant-Appellee.

ORDER

Before: WEICK, CELEBREZZE and PECK,
Circuit Judges

Appellants request that the Court grant five categories of expenses enumerated in their Bill of Costs.

Items 1 through 3 are taxable as costs under Rule 39 of the Federal Rules of Appellate Procedure, and Appellees do not object to their being awarded.

1.	Filing fee for Court of Appeals	$ 25.00
2.	Duplication of briefs	307.73
3.	Cost of transcript of District Court proceedings	142.70
	Total	$475.43

Items 4 and 5, attorneys' fees and out-of-pocket expenses, may not be taxed against Appellee. In *Jordon, et al.* v. *Gilligan, et al.*, (6th Cir. No. 73-1973, July 18, 1974), we held, "We find no reasonable base for concluding that the Eleventh Amendment does not bar awards of attorneys' fees against the sovereign state." Slip Op. at 10. *See also Taylor* v. *Perini* —— F.2d —— (—— 6th Cir. 1974). No. 73-2071. We find that even though Commissioner Speight is the named defendant, he is a nominal defendant and the State of Tennessee is the real party in interest.

Therefore, it is ordered that the petition for costs be granted in the amount of $475.43.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 73-1668 & 73-1669

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiff-Appellant,

v.

CLAUDE S. BRINEGAR, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed April 3, 1974

Before: WEICK, CELEBREZZE and PECK, Circuit Judges

CELEBREZZE, Circuit Judge. This litigation began in 1969, when Secretary of Transportation, John A. Volpe, approved a 3.7 mile extension of Interstate Highway 40 through Memphis, Tennessee. Four thousand feet of this project was to cut through Overton

Park, a public wooded area in downtown Memphis. Citizens to Preserve Overton Park, Inc., organized to oppose the Secretary's action. They challenged his approval as contrary to § 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f). Section 4(f) states that "the Secretary of Transportation shall not approve any program or project which requires the use of any publicly owned land from a public park", among other areas,

> "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . resulting from such use."

The District Court granted summary judgment for defendants, 309 F. Supp. 1189 (W.D. Tenn. 1970). This decision was affirmed by this court with one judge dissenting. 432 F.2d 1307 (6th Cir. 1970). The Supreme Court reversed, holding that the District Court must review the full administrative record before the Secretary at the time of his decision in order to determine whether the Secretary "could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems" and whether the Secretary's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." 401 U.S. 402, 415-416 (1971).

On remand, the District Court, having conducted a full hearing and having probed the prior administrative proceedings, concluded that the Secretary had made a proper decision as to the design of the proposed route and had only to determine whether the

Overton Park route was the sole feasible and prudent route. Thus, the Court remanded the case to the Secretary "only for the purpose of making a route determination in compliance with § 4(f) of the Department of Transportation Act of 1966 as that provision has been construed by the Supreme Court". The Court enjoined both the federal and state defendants from engaging in activities which would advance construction of the Overton Park route.

Secretary Volpe ordered a full review of the decision thereafter. Because of legislation passed and regulations issued after his initial approval of the route, the Secretary ordered the preparation of an environmental impact statement in accordance with § 102(c) of the National Environmental Policy Act of 1969, and the holding of a public hearing in compliance with § 5(b) of Policy and Procedure Memorandum 20-8, promulgated under the 1970 Federal-Aid Highway Act. After a searching administrative review of the matter, Secretary Volpe refused to approve the Overton Park route on January 18, 1973. He stated that the National Environmental Policy Act, the Federal-Aid Highway Act, and the noise standards set by the Federal Highway Administration, as well as the Supreme Court's interpretation of § 4(f), had weighed in his reconsideration of the matter:

> "On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the

> courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA standards on noise."

The Secretary noted "possible alternatives which the State of Tennessee may wish to consider," without endorsing a particular one or rejecting the "no build" alternative.

Commissioner Charles W. Speight, of the Tennessee Department of Highways (hereafter the State), responded to this rejection on February 1, 1973, by petitioning the District Court for an order requiring the Secretary "to comply with terms of remand order or, in the alternative, to dissolve injunction as to state defendant." The State argued that the Secretary had not made a "route determination" as required by the Court's original remand order. The State also argued that the Secretary had gone beyond the terms of the remand order in reconsidering the highway's design and that the Secretary had failed to discharge his 49 U.S.C. § 1653(f) obligation to make a route determination. The crux of the State's objection was that it was entitled either to proper approval of the Overton Park route or to a formal statement of what other route is prudent and feasible, along with specific findings of any other legal shortcomings of the Overton Park route. The State's fear was that the Secretary's rejection of the Overton Park route left it with no obvious direction—with no alternative proposal guaranteed of federal funding.

On May 1, 1973, the District Court granted the relief requested by the State. The Court found that the Secretary had not made the route determination required by his January 5, 1972 remand order. He therefore ordered the new Secretary of Transportation, Claude S. Brinegar, to perform several acts. First, the Secretary must either find unequivocally that there is no feasible and prudent alternative to the use of Overton Park land for interstate 40 (thus amounting to approval of that route), or state that there is at least one feasible and prudent alternative route and specify it, so that the court can review the correctness of that decision. Second, the Secretary must find and state for the record, if true, that the Overton Park route would violate the National Environmental Policy Act of 1969, the 1970 Federal-Aid Highway Act, or the noise standards of the Federal Highway Administration, and at least designate the respects in which such provisions would be violated by the construction of this project. Third, the Secretary need not reconsider approval of the Overton Park route (the putative rejection of January 18, 1973, having been found unlawful), but he may reconsider the design decision (a separate decision from the question of approving the park route in any form). Fourth, the Secretary must bear the burden of obtaining any additional information, as the District Court discharged the State of Tennessee from any further responsibility to produce information for the Department of Transportation. Finally, the Secretary must do all these things within 45 days.

In separate appeals, consolidated for review by this court, Citizens to Preserve Overton Park and the

Secretary of Transportation attack the District Court's decision. The Secretary argues that the District Court's interpretation of § 4(f) is "wholly foreign to the statutory scheme Congress has enacted to govern the use of federal funds in highway construction." Whereas the District Court held, and the State urges, that § 4(f) requires a formal statement of findings and reasons from the Secretary for rejecting the Overton Park route, the Secretary claims that under § 4(f) he is merely foreclosed from approving a proposal which would take parklands so long as he is not convinced that there is no prudent and feasible alternative to the use of such lands. The Secretary contends that upon such rejection, § 4(f) does not require anything more of him and that he need not affirmatively find that a particular feasible and prudent alternative exists. These differing interpretations of § 4(f) embody quite different conclusions as to what the Secretary must do to reject a state proposal for federal highway construction funds.

Our resolution of these conflicting statutory interpretations first requires a determination of the Secretary's scope of authority in considering proposals before him. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-16 (1971). We find that the Secretary properly construed his authority. It is clear to us that the statute is designed to require the Secretary to scrutinize proposed highways for the protection of park lands, and places no affirmative duty on the Secretary to specify any particular route as a feasible and prudent alternative to the proposed route.[1]

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[1] The statute is drafted in a negative manner and prohibits the Secretary from approving a proposed route unless

The State's main contention is that the Secretary's decision is procedurally inadequate because his failure to specify an alternate route prohibits adequate judicial review of his decision. We do not agree. As noted in the *Overton Park* case by the Supreme Court, formal findings are not required by either the Department of Transportation Act or the Federal-Aid Highway Act. 401 U.S. at 417. Here, the Secretary made suggestions as to possible alternative routes. A specific finding as to a particular route is not required. Thus, the Secretary's explanation of his action is not so vague as to frustrate judicial review. The validity of the Secretary's action must stand or fall on the propriety of that finding judged by the appropriate standard of review. *See Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973).

The burden of choosing the route does not, as the District Court held, lie with the Secretary. The Secretary only approves or disapproves a particular route. *Township of Hopewell* v. *Volpe*, 446 F.2d 167, 171 (3d Cir. 1971). The Federal-Aid Highway Act,

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he finds that no feasible and prudent alternative exists. Had Congress intended that the Secretary specify an alternate route it would have been an easy matter to insert a requirement in the statute. However, the statutory requirements are minimal. In addition to the clear language of the statute, the legislative history of the Act reveals the primary purpose of the statute to be the protection of vital park lands, parks, historic sites and similar areas. U.S. Code Congressional and Administrative News 3482, 3499-3500, 90th Congress, 2d Session (1968). The language of 23 U.S.C. § 138 (Federal-Aid Highway Act of 1968) was amended to have the identical language as 49 U.S.C. § 1653(f). U.S. Code Congressional and Administrative News, 3482, 3538-39, 90th Congress, 2d Session (1968).

23 U.S.C. § 101 *et seq.*, prescribes the procedure to be followed in obtaining federal funds. 23 U.S.C. § 103(e) provides that

> "The routes of [the Interstate] system * * * shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary. * * *"

The first step in initiating a request for federal funds is provided in § 105(a):

> "As soon as practicable after the apportionments for the Federal-Aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds apportioned."

Following approval of the project plans are to be submitted to the Secretary:

> "* * * the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require." 23 U.S.C. 106(a).

Thus, it is incumbent on the state to come forward with a particular route. *Arlington Coalition on Transportation* v. *Volpe*, 458 F.2d 1323, 1328 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000; *Lathan* v. *Volpe*, 455 F.2d 1111, 1115 (9th Cir. 1971); *Town-*

ship of Hopewell v. *Volpe*, 446 F.2d 167, 171 (3rd Cir. 1971). If one route is disapproved, the burden is on the state to submit another proposal to the Secretary and at that time the Secretary would be required either to approve or disapprove the new proposal.

We hold that the Secretary has at this point complied with his duties under the statute. The order of the District Court remanding the case to the Secretary is therefore reversed.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed Apr. 3, 1974, James A. Higgins, Clerk]

Nos. 73-1668
73-1669

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Plaintiff-Appellant,

v.

CLAUDE S. BRINEGAR, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant,

and

CHARLES W. SPEIGHT, COMMISSIONER, TENNESSEE DEPARTMENT OF HIGHWAYS,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Tennessee.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judg-

ment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Plaintiffs-Appellants to recover from Defendants-Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A True Copy.
Attest:

John P. Hehman, Clerk

Issued as Mandate:

COSTS: To be recovered by Appellants

Filing fee	$ 25.00
Printing	450.43
Total	$475.43

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil C-70-17

[Filed Apr. 19, 1973, Clerk, U.S. Dist. Court, Western Dist. of Tenn.]

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL,
Original Plaintiffs

and

SIERRA CLUB, ET AL,
Intervening Plaintiffs,

v

JOHN A. VOLPE, Secretary, Department of Transportation, and CHARLES W. SPEIGHT, Commissioner, Tennessee Department of Highways,
Original Defendants,

and

CITY OF MEMPHIS, ET AL,
Intervening Defendants

MEMORANDUM DECISION

This is an action to enjoin the Secretary of Transportation from releasing federal funds to the Highway Department of the State of Tennessee for construction of a segment of an interstate highway through Overton Park in Memphis. This Court granted summary judgment for defendants. 309 F. Supp. 1189 (1970). The Court of Appeals for the

Sixth Circuit affirmed. 432 F.2d 1307 (1970). The Supreme Court reversed and remanded for a plenary review of Secretary Volpe's approval of the release of federal funds for this project in November, 1969. 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The evidentiary hearing was then held by this Court, and this Court's memorandum decision, filed January 5, 1972, is reported in 335 F.Supp. at 873.

In the memorandum decision, this Court held: (1) that Secretary Volpe had never actually made a route or corridor determination as is required by § 4(f) of the Department of Transportation Act of 1966, as amended, (49 U.S.C.A. § 1653(f));[1] and (2) that even if Secretary Volpe had made such a determination, his determination was based on an incorrect view of the applicable law. Accordingly, we remanded to the Secretary to make a route determination in accordance with the applicable law. We also ruled that the Secretary's approval of the proposed design of the interstate through Overton Park should stand and that he need not reconsider such approval.

There was no appeal of this Court's decision remanding to the Secretary.

On January 21, 1972, Secretary Volpe stated in a news release, in part:

> "I have asked for a complete analysis of the entire record that was before the court, with particular attention to alternative locations for this highway. That analysis will be done in the context of a thorough, detailed environmental im-

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[1] An identical provision is contained in § 18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C.A. § 138).

> pact statement, which is required by the National Environmental Policy Act. Once this analysis is complete, a new decision will be made."

Thus the Secretary decided that, in making the determination under § 4(f) of the Department of Transportation Act of 1966, he must also comply with the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4321 et seq., (NEPA). Secretary Volpe also decided to require additional route and design public hearings and such were held, combined, on September 14 and 15, 1972 in Memphis.

On January 12, 1973, the Acting Federal Highway Administrator wrote a memorandum to his superior, Secretary Volpe, attaching a 457 page final environmental impact statement prepared pursuant to NEPA. The memorandum concluded that it was the determination of that Administration under § 4(f) that there was no feasible and prudent alternative to the route through Overton Park and that the proposed design included all possible planning to minimize harm to the park.

On January 18, 1973, Secretary Volpe rendered his decision, which we quote in its entirety:

> "SECRETARIAL DECISION ON I-40,
> OVERTON PARK
> MEMPHIS, TENNESSEE
>
> In November 1969, I approved the designated route of I-40 through Overton Park in Memphis, Tennessee. The U.S. Supreme Court in March 1971 ruled that a lower court decision finding my approval in compliance with Section 4(f) of the Department of Transportation Act of 1966

was not substantiated by the record before the lower court. In January 1972, the U.S. District Court directed that the Department of Transportation make a new determination on this proposal in light of the Supreme Court decision.

This project has now been resubmitted by the State of Tennessee and come before me a second time for my approval. During the interim since my original action, the National Environmental Policy Act has been passed and signed into law. Thereafter the 1970 Federal Aid Highway Act added new requirements for consideration of environmental effects of highway projects, and in response to that requirement FHWA has set standards for the levels of noise around Federal aid highways. In addition, the Supreme Court, in its decision on this project, held that "protection of parkland was to be given paramount importance" and that "public parks were not to be lost unless there were truly unusual factors present" or "the cost or community disruption resulting from alternative routes reached extraordinary magnitudes." Each of these new developments has weighed in my deliberations.

On the basis of the record before me and in light of guidance provided by the Supreme Court, I find that an Interstate highway as proposed by the State through Overton Park cannot be approved. On that record I cannot find, as the Statute requires, and as interpreted by the courts, that there are no prudent and feasible alternatives to the use of parkland nor that the broader environmental protection objectives of the NEPA and the Federal-Aid Highway Act have been met,

nor that the existing proposal would comply with FHWA standards on noise.

Among the possible alternatives which the State of Tennessee may wish to consider are the use of the I-240 circumferential combined with improvements to arterial streets, alternative routes such as the L & N Railroad corridor and a broadened use of public transportation facilities and services or combinations of the above to meet the transportation needs in and around Memphis. Apart from alternative locations, I am also convinced that a tunnel design would be less harmful to the park than the present design. Listing these possible alternatives should not, of course, be construed either as an endorsement of any of them or as an exclusion of any other alternative that I have not mentioned. Likewise it should not be construed as a finding that the "no build" alternative has been rejected.

/s/ John A. Volpe
Secretary of Transportation

18 January 1973"

The State defendant has filed a petition to remand to the Secretary of Transportation, contending that Secretary Volpe did not, in his decision of January 18, 1973, make the determinations required to be made by the statutes to which he referred in his decision. The Secretary and the plaintiffs contend that he did make such determinations required by the statutes. The petition for remand is now before this Court for decision upon responses thereto, argument of counsel and briefs.

The Federal-Aid Highway Act provides the statutory scheme for cooperation between the federal and state governments for construction of highways and for financial contributions thereto by the federal government. This statutory scheme is outlined in *State Highway Commissioner of Missouri* v. *Volpe, Secretary*, —— F.2d —— (8th Cir. April 2, 1973), as follows (footnotes omitted):

> "Congress deemed it within the 'national interest to accelerate the construction of the Federal-aid highway systems' to serve local and interstate commerce and to enhance national and civil defense. 23 U.S.C. § 101(b) (1970). The objective of the Act was the creation of a National System of Interstate and Defense Highways. The system was to be completed 'as nearly as practicable' over the period of twenty years on an expedited construction basis.
>
> Based upon specific formulas set forth within the Act, the Secretary is required to apportion among the several states certain sums authorized to be appropriated for expenditures. 23 U.S.C. § 104 (b). After the apportionment, the states, through their respective highway departments, are to submit programs of proposed projects based upon the apportioned funds. The Secretary is instructed in Section 105(a) to 'act upon programs submitted to him as soon as practicable after the same have been submitted.' Section 106(a) then provides that 'as soon as practicable after program approval,' specific 'surveys, plans, specifications, and estimates for each proposed project' will be submitted to the Secretary for his approval. In this regard, Section 106(a) specifi-

> cally states that in approving the project plans 'the Secretary shall be guided by the provisions of section 109 of this title.' It is at this stage that the contract controls are imposed, for once a project is approved by the Secretary it 'shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.' 23 U.S.C. § 106(a). On the basis of this approval, states are permitted to obligate the apportioned funds through the letting of construction contracts, etc. Section 118(b) provides that the sums 'available for expenditure' shall remain available for expenditure in that state for a period of two years after the close of the fiscal year for which the sums are authorized, and any funds not expended after that time shall lapse, except that unexpended funds apportioned for the Interstate System shall 'immediately be reapportioned among the other States. . . .' The final stage of the Act is the appropriation by Congress of money from the Highway Trust Fund to pay the state the proportional federal share of construction costs incurred in the partial or total completion of the highway projects."

Thus it will be seen that under this statute the state highway departments plan highway projects that are submitted to the Department of Transportation for consideration and approval and funding.

§ 4(f) of the Department of Transportation Act of 1966 (as does § 18(a) of the Federal-Aid Highway Act of 1968) provides that ". . . the Secretary shall not approve any program or project which requires the use of any publicly owned land from a

public park . . . unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park. . . ."

This provision, of course, does not, contrary to the statutory scheme created by the Federal-Aid Highway Act, shift to the federal Department of Transportation the burden of planning any highway projects. This provision does, however, impose upon the Secretary the additional burden, where a proposed project would use parkland, to determine whether there is, or is not, a feasible and prudent alternative. If he finds that there is no feasible and prudent alternative and that the project satisfies the applicable law in other respects (including the other requirements contained in the Federal-Aid Highway Act), he approves the project. However, if he finds that there is a feasible and prudent alternative, then he must, for this reason alone, disapprove the project.

In his decision of January 18, 1973, while it is clear that Secretary Volpe did not find that there is no feasible and prudent alternative, it is equally clear that he did not find that there is a feasible and prudent alternative. He simply said that ". . . I cannot find . . . that there are no prudent and feasible alternatives to the use of parkland . . ." and goes on to suggest ". . . possible alternatives[2] which the State

[2] One of the Secretary's suggested alternatives, the so-called L & N Railroad corridor, was urged by the plaintiffs at the evidentiary hearing in this court as a feasible and prudent alternative. In our remand decision (335 F.Supp. 873), we ruled that a decision by the Secretary that such is a feasible and prudent alternative would, under the evidence, be supportable.

of Tennessee may wish to consider. . . ." [3]

Plaintiffs and the Secretary contend here that even though the Secretary did not find that there is no feasible and prudent alternative, he had no obligation to find that there is a feasible and prudent alternative. Plaintiffs further contend that there is only a "semantic difference" between a finding that there is a feasible and prudent alternative and his decision that "I cannot find" that there is no feasible and prudent alternative.

As heretofore stated, this Court is of the view that, contrary to the contention of plaintiffs and the Secretary, the Secretary was obligated to do more than to decide that he could not find that there was no feasible alternative. In this context, the Secretary was obligated to find that there was a feasible and prudent alternative. We reach this conclusion from the content of § 4(f) itself. Under this provision, the Secretary may not approve use of park land unless there is no feasible and prudent alternative. Thus if he approves use of park land, he must find there are no such alternatives; on the other hand, if he disapproves such use, he must find that there is such

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[3] The Secretary does not indicate in his decision that he was unable to make such finding because of an incomplete record. Neither the plaintiffs nor the Secretary so contend here. In point of fact, at the time of this decision the Secretary had before him: (1) the administrative record that was before him at the time of his November, 1969 approval; (2) the transcript of the six-week trial in this court; (3) the transcript of the additional public hearings held in September, 1972 in Memphis; and (4) the final 457 page environmental impact statement prepared by his Department with the cooperation of the State of Tennessee.

an alternative. Once the administrative record is, as it was here, sufficiently complete, the Secretary must make the decision, and if he refuses to do so, a decision may be compelled by a court. 5 U.S.C.A. § 706 (1).

We are further of the view that not only was the Secretary, in this context, obligated to find that there is a feasible and prudent alternative, but also he was obligated to at least designate such alternative or alternatives. We reach this conclusion because such is necessary if the State defendant is to have effective judicial review of the Secretary's finding that there is a feasible and prudent alternative.[4] Obviously, a court could not review a finding that there is a feasible and prudent alternative unless the Secretary designates what it is. This Court recognizes that the Supreme Court held in this case (401 U.S. at 417) that formal findings are not necessary, and that therefore the Secretary need not give reasons for finding that a designated alternative is a feasible and prudent one.

In his decision of January 18, 1973, Secretary Volpe also said ". . . I cannot find . . . that the broader environmental protection objectives of NEPA and the Federal-Aid Highway Act have been met, nor that the existing proposal would comply with FHWA [Federal Highway Administration] standards on noise."

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[4] Neither plaintiffs nor the Secretary contend that the Secretary's disapproval of the use of park land is not subject to judicial review. In any event, we conclude that it is subject to such review, under 5 U.S.C.A. § 701, for the same reasons that the Supreme Court held in this case that the Secretary's approval of the use of park land in November, 1969, was subject to review under that provision.

This Court concludes that Secretary Volpe was obligated, in this context, to find that the Overton Park route or design violated the provisions of NEPA and the Federal-Aid Highway Act and the standards with respect to noise of the Federal Highway Administration. This Court further concludes that the Secretary was obligated to at least designate the respects in which such provisions would be violated by the construction of this project. We reach these conclusions for the same reasons that we reached such conclusions with respect to the Secretary's § 4(f) determination.

As heretofore stated, in our remand decision of January 5, 1972, we ruled that the Secretary was not required to reconsider his approval of the proposed design of the route through Overton Park. It is obvious that the Secretary did reconsider such design. It is still this Court's view that, since we have heretofore ruled that the Secretary's approval of the design should stand, the present Secretary need not reconsider it. It is also our view that, since a Secretary of Transportation has never made a valid route decision, the present Secretary may, in his discretion, reconsider the design decision.

Under these circumstances of long delay and the familarity of the officials in the Department of Transportation with this record, this Court is of the view that the remand order should require a decision within 45 days.

A remand order will be prepared for entry.

ENTER this 19th day of April, 1973.

/s/ Bailey Brown
Chief Judge